Supreme Court, U.S.
FILED
NOV 16 1995
OFFICE OF THE CLERK

(3)

No. 95-576

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CHRISTINE WILLIAMS and CITIZENS FOR LIFE, *Petitioners,*

v.

PLANNED PARENTHOOD SHASTA-DIABLO, INC., *Respondent.*

On Petition for Writ of Certiorari to the Supreme Court of California

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REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The decision below affirms an extreme imposition on free speech, namely, the creation, by injunction, of a "First Amendment cage." Petitioners are forbidden to exercise their free speech rights, save in a small area across a four-lane thoroughfare from their intended audience. *See* Diagram B, App. 40a.

The California Supreme Court rendered the decision below after remand from this Court for reconsideration in light of *Madsen v. Women's Health Center*, 114 U.S. 2516 (1994). Because the trial record could not support this sweeping injunction under the *Madsen* test, the court improvised, creating both new factual findings and a new state interest justifying the restrictions.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *MADSEN*.

A. *The injunction was not necessary to protect access.*

Respondent does not, and indeed cannot, dispute that before *Madsen*, both the state supreme court and the court of appeals agreed that the injunction was not narrowly tailored to protect pedestrian and vehicular traffic. App. 74a, n.4; App. 87a n.10 ("the critical issue here was not access"). Nor can Respondent cite any trial court findings that petitioners had interfered with access from the street or sidewalk.

Instead, Respondent simply asserts that the record "contains abundant evidence . . . to support the court's decision." Opp. at 6. Respondent then goes on to cite evidence that was presented at the hearing on the preliminary injunction, or evidence that was presented about events occurring before the preliminary injunction issued. As Justice Kennard points out in her careful review of the evidence, there is nothing in the record to support a finding that the petitioners interfered with access after the preliminary injunction issued. In fact, other than

a few ambiguous comments from Respondent's witnesses,[1] there was no evidence at all about the petitioners' conduct after the preliminary injunction issued.[2] App. 25a–26a. (Kennard, J., dissenting).

Finally, Respondent attempts to clean up after the lower court, by stating, "Based upon an independent review of the record . . ., the California Supreme Court concluded that 'petitioners had significantly blocked driveways, surrounded patients' cars, and stalked and obstructed patients . . .'" Opp. at 8 [citing App. 15a–16a]. In fact, what the decision below says is that "the trial court found" that the petitioners had engaged in this conduct. This is patently false. The trial court made no such findings. Pet. at 13. The Supreme Court simply projected its "findings" onto the trial court.

B. *Constitutionally protected activity is not "fundamentally incompatible" with the operation of a medical facility.*

Respondent asserts that petitioners erred in distinguishing speech activity which invades a medical facility, such as noise, from that which is confined to the public sidewalk. Opp. at 9. Respondent states, "The question is whether the activity is fundamentally incompatible "with the 'nature of [the] place, [and the] pattern of its normal activities.' *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972)."

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[1] Respondent does not dispute that two ambiguous statements by respondent's witnesses constitute the sole basis for the lower court's inference that petitioners had violated the injunction, and consequently the sole basis for the inference that the injunction had failed to protect access. Cf. Opp. at 8 n.5; Pet. at 13–14; App. 25a–26a, 30a–32a.

[2] Respondent notes that the petitioners failed to request that transcripts of all the proceedings below be included in the record. Opp. at 6 n.3. The omitted portions of the record of the trial contain simply the closing arguments and a motion by petitioners, not evidence. App. 47a n.1. Moreover, the evidence at the hearing on the preliminary injunction obviously would have no bearing on the critical issue of whether the petitioners obeyed the preliminary injunction and whether there was any interference with access after the preliminary injunction issued.

Revealingly, the restriction upheld in *Grayned* was a *noise* restriction, specifically an ordinance prohibiting excessive noise in the vicinity of schools. This Court's decision focussed on the disruptive effect of noisy demonstrations on the activities going on *in* the classrooms; there was no attempt to define demonstrations *per se* as incompatible with the school environment. In fact, the Court stated, "The antinoise ordinance imposes no such restriction on expressive activity before or after the school session, while the student/faculty 'audience' *enters and leaves* the school." Id. at 120 (emphasis added).

Respondent also cites *Frisby v. Schultz*, 487 U.S. 474 (1988), in which this Court narrowly construed an ordinance prohibiting residential picketing as a ban on "focused picketing taking place solely in front of a particular residence." *Id.* at 483. In doing so, this Court stated, "Although in many locations we expect individuals simply to avoid speech they do not want to hear, [citations omitted], *the home is different*." *Id.* at 484 (emphasis added). Citing the intrusive nature of the speech into the home, the Court stated, "The resident is figuratively, and perhaps literally, trapped *within the home*, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech. *Id.* at 487 (emphasis added).

Respondent's attempt to use these cases to support the lower court's decision is misguided. In these cases, this Court specifically distinguished the speech activity at issue from speech activity where both the speech and the intended audience are in a public forum. Yet Respondent sees in these cases a rationale for banning petitioners and their message from the public sidewalk where the intended audience is. According to Respondent, its clients are a "captive audience" not because they cannot get away from the speech, but because they encounter it at all.[3]

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[3] The other cases cited by Respondent in support of its "incompatibility principle" are similarly inapposite. *Cox v. Louisiana*, 379 U.S. 559 (1965), must be read in light of *U.S. v. Grace*, 461 U.S. 171 (1983), in which this Court struck down a ban on carrying flags or signs on the sidewalks adjacent to the Supreme Court. This Court held that "a total ban on that conduct is no more necessary for the maintenance of peace and tranquility than on any other sidewalks in the city." *Id.* at 182.

C. *The lower court erroneously held that the zone could be justified to protect the health and safety of patients by preventing "stress and anxiety."*

Respondent states that requiring evidence that at least one patient's health had been adversely affected by the petitioners "would be barbaric." Opp. at 10 n.7. In Respondent's view, the finding that some women became "emotionally distraught" is sufficient to justify banishing petitioners from the sidewalk.

Petitioners have never disputed that many women considering abortion are in an emotionally delicate state. Further, such women may indeed become "emotionally distraught" upon confronting the reality of abortion contained in petitioners' anti-abortion message. Of these, some women go on to abort, while others reconsider their decision and choose to carry their baby to term. To require petitioners to communicate their message in such a bland, unconvincing way that no woman becomes "emotionally distraught" is a travesty of the First Amendment.[4]

Respondent, of course, asserts that it is not the content of the message, but the conduct of the petitioners which has caused women to become emotionally distraught. However, in the context of abortion, which engenders intensely emotional reactions, to determine whether content or conduct is responsible for the emotional reaction of the audience is practically impossible. Courts which attempt such a determination are bound to fall into the same trap as did the court below. Rather than considering whether the petitioners engaged in any objectively unlawful conduct, the court characterized the petitioners' expressive activities of leafletting and counselling as unlawful harassment and intimidation, and therefore enjoinable, because of their emotional impact on the audience. The First Amendment, however, does not tolerate restrictions on speech predicated on subjective audience reactions. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); *Texas v. Johnson*, 491 U.S. 397 (1989).

In *Burson v. Freeman*, 114 S.Ct. 1846, 1851 (1992), this Court upheld a content-based restriction on speech in the vicinity of polling places, as the result of "a particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote—a right at the heart of our democracy." This Court held that the restriction served, and had served for over a century, the *compelling* state interest in preventing voter fraud and intimidation.

[4] Cf. *Cannon v. City and County of Denver*, 998 F.2d 867, 874 (10th Cir. 1993) ("although the words 'killing' or 'murder' are certainly emotionally charged, it is difficult to conceive of a forceful presentation of the anti-abortion viewpoint which would not assert that abortion is the taking of a human life").

As a practical matter, a trial court in Vallejo recently abandoned all pretense that the injunction in the instant case was imposed to prevent unlawful conduct by the petitioners. On November 7, nine individuals were found guilty of violating Cal.Pen.C. § 166(4) (disobedience of a lawful court order) despite a complete absence of substantial evidence that they were connected to or acting in concert with the petitioners in this case. *People v. Conrad, et al.*, Vallejo-Benicia Muni. Ct. Nos. 113148, 113214. The evidence at trial was clear, and the judge as trier of fact acknowledged, that the defendants were engaged in peaceful picketing on the public sidewalk in front of the clinic. The evidence was also undisputed that the defendants, only one of whom lives in northern California, were not acting in cooperation with or at the behest of the petitioners, nor did they even know the petitioners.

However, two of Respondent's employees testified that they had a written legal opinion from Respondent's attorneys, stating that "anyone doing what those named in the injunction were prohibited from doing" was thereby "acting in concert" with the petitioners, and thus was in violation of the injunction. The city attorney agreed with this interpretation and authorized the arrests and prosecutions of the defendants. The trial court judge refused to disapprove this overreaching interpretation, and indeed apparently endorsed it, thus converting the injunction into a judicially-created ordinance, for the special benefit of Respondent.[5]

[5] The trial court judge has indicated that he will impose jail sentences on at least two of the defendants, and quite possibly others. He has also indicated that he is considering imposing sentences of community service to be performed for Respondent Planned Parenthood, i.e., compelling pro-life persons to work for an abortion provider.

This outrageous ruling is, of course, the logical outcome of Respondent's arguments, adopted by the court below. If pro-life speech activity in front of an abortion clinic is "fundamentally incompatible" with the activities of a medical facility in that it is likely to cause some women to become emotionally distraught, then it is irrelevant whether the persons engaging in the activity are the petitioners who allegedly have abused their right to be on the sidewalk, or complete strangers to the litigation. The purpose of an injunction creating a small "First Amendment cage" at such a distance from the site is not to ensure access or to protect clients from unlawful conduct. Rather, the obvious purpose of this injunction is to insulate Respondent's clients from pro-life speech activity, particularly leafletting and one-on-one contact. The Vallejo criminal court is enforcing the injunction in that spirit.

II. CONFUSION OVER THE MEANING OF *MADSEN* IS GROWING IN THE LOWER COURTS.

This Court has pending before it a petition for certiorari in *Reali v. Feminist Women's Health Center*, No. 95-366 (filed Aug. 30, 1995). In that case, as in the present case, pro-life citizens seek review of a judgment imposing a speech-restrictive injunction outside an abortion facility. While the speech-free zone in *Reali* is smaller than that imposed in the case at bar, the judgment in *Reali* contains a $100,000 attorney fee award against the enjoined picketers and sidewalk counselors.

Reali and the present case form the two blades of a scissors cutting off all leafletting, picketing, and verbal contact in public fora outside abortion facilities. The decision below authorizes injunctions banning such expression anywhere on the entire sidewalk, while *Reali* authorizes concomitant crushing attorney fees liability. The result is the effective elimination of free speech in public fora for all but the foolhardy and the judgment-proof.

This disturbing trend extends beyond California. Within the past two months, the Second and Ninth Circuits of the federal court of appeals have weighed in with decisions likewise limiting pro-life speech in public fora outside abortion facilities. The first case, *Pro-Choice Network of Western New York v. Schenck*, No. 92-7302 (2d Cir. Sept. 28, 1995) (en banc) (1995 WL 570394), upholds both speech-free zones and personal "floating bubble" zones. A panel of the Second Circuit, properly applying *Madsen*, initially overturned these restrictions, which were in force at every abortion facility in the Western District of New York. *Pro-Choice Network of Western New York v. Schenck*, 34 F.3d 130 (2d Cir. 1994). After the appellate mandate had already issued, the Second Circuit allowed an untimely petition for rehearing en banc, and after rehearing reversed the panel.

The nine-judge lead opinion of Judge Oakes held that the speech restrictions were constitutional even though an initial, less restrictive temporary restraining order had already successfully ensured access. Slip op. at 21-22. The lead opinion also held that this Court's decision did not invalidate a provision requiring counselors to back off fifteen feet whenever the intended audience requested. Slip op. at 26-27.

A ten-judge "concurring" opinion by Judge Winter was more sweeping in its revision of First Amendment law:

> Generally, targeted persons, whether they be customers of a business, residents of a particular house, workers at a firm, the trustees of a university, military recruiters, delegates at a political convention, or patients and employees of an abortion clinic, are not voluntarily exposed to the protests. . . .
>
> In my view, therefore, there is no right to invade the personal space of individuals going about lawful business . . . or to do anything that cannot be fairly described as an attempt at peaceful persuasion. Moreover, an extensive record of coercion or obstruction is not required to justify an injunction requiring physical separation and an end to such conduct. The power of even isolated threats or obstructions to exert a chilling effect on some members of society need not be ignored. The timid have a right to go about their business, and it is no embarrassment for a federal court to say so.

Winter conc. at 5-6. In other words, everyone is a captive audience when coming from and going to a place of personal or professional business, simply because they did not choose to be exposed to the speech. The term "chilling effect" has been co-opted by Judge Winter

to mean the effect of speech on the listener, not the effect of restrictions on a would-be speaker. Furthermore, Judge Winter explicitly endorses a one-strike-and-you're-out rule, by holding that even an isolated incident of obstruction may warrant a speech-free zone.

In an even more recent case, the Ninth Circuit upheld the imposition by ordinance of a personal "floating bubble" zone. *Sabelko v. City of Phoenix*, No. 94-15495 (9th Cir. Oct. 19, 1995) (1995 WL 611422), *rev'g* 846 F. Supp. 810 (D. Ariz. 1994). The challenged ordinance required any person engaged in "demonstration activity" within 100 feet of an abortion facility to "withdraw" at least eight feet from any person so requesting. The district court held that the restriction was unconstitutional, but a panel of the Ninth Circuit reversed. The majority held that *Madsen* had established standards for speech restrictions outside health care facilities, and that "the Supreme Court in *Madsen* expressly recognized that persons approaching a health care facility represent a 'captive audience,' thus rejecting the position . . . that a public area adjacent to a health care facility must be considered, for all purposes, an open forum." 1995 WL 611422 at *3. The fact that *Madsen* itself struck down a ban on approaching without consent did not preclude a ban on failing to withdraw upon request. *Id.* at *3-*4.

However, as Judge Meskill noted in his dissent in *Pro-Choice Network*, this Court has limited application of the "captive audience" doctrine to cases in which the speech intrudes on the home, or in which "the audience is physically constrained by its environment." Meskill dis. at 16 (citing *Lehman v. Shaker Heights*, 418 U.S. 298 (1974)). Consistent with those limitations,

> [t]he *Madsen* Court simply recognized that women *in* the clinic were "held 'captive' by medical circumstance," *Madsen*, 114 S. Ct. at 2526, thus supporting some of the injunction's restrictions, for example, those on banning loud noise levels or prohibiting the use of sound amplification equipment. This, however, does not mean that the women *approaching* the clinic are captive, and nothing in *Madsen* can be read as so holding.

Id. at ii, n.5 (original emphasis).[6]

In *Madsen*, this Court formulated a demanding standard of review for speech-restrictive injunctions. 114 S. Ct. at 1515-26. *Madsen* plainly calls for meticulous parsing of both the injunctive provisions at issue and the factual circumstances alleged to support those restrictions. Yet, in the wake of *Madsen*, lower courts have disregarded both the heightened scrutiny and the demanding factual showing *Madsen* requires, and reduced it to a simple license to uphold speech-free zones, whether stationary or floating, outside abortion facilities.[7]

CONCLUSION

The petition for certiorari should be granted.

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[6] *See also Edwards v. City of Santa Barbara*, 883 F. Supp. 1379 (C.D. Cal. 1995), *appeal docketed* No. 95-55595 (9th Cir. April 14, 1995) (striking down ordinance establishing speech-free zones and personal bubble zones in front of health care facilities; "this Court notes that Defendants cite no authority for applying the captive audience doctrine to individuals on public sidewalks en route to medical treatment. Indeed, the captive audience doctrine has traditionally been limited to situations where an individual is at home. [citing *Frisby v. Schultz*, 487 U.S. 474 (1988)]. The captive audience doctrine has been applied only sparingly in public fora. [citing *Lehman v. Shaker Heights*, 418 U.S. 298 (1974)]").

[7] *See also Hill v. City of Lakewood*, No. 94CA0856 (Colo. Ct. App. July 13, 1995) (1995 WL 411983) (upholding statewide statute prohibiting, in vicinity of medical facility, approaching within eight feet of another person without prior consent, for the purpose of leafletting, picketing, or engaging in protest, education, or counseling).

Respectfully submitted,

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November 17, 1995